UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CARROLL REED, INC.,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 91-419-P-DMC***
	)	
CRSS SKI & SPORT, INC. and FREDERICK L. LEIGHTON,	)	
	)	
	)	
Defendants	)	

MEMORANDUM DECISION[1]

This diversity case arises out of a series of disputes involving four subleases and four cotenancy arrangements between plaintiff Carroll Reed, Inc. (``Carroll Reed") and defendant CRSS Ski & Sport, Inc. (``CRSS"). The second defendant, Frederick Leighton (``Leighton"), is president and chief executive officer of CRSS.

The plaintiff seeks damages from CRSS for breach of contract, specifically its failure to pay base rent, common area maintenance expenses (``CAMS") and utilities with respect to the four subleased premises and its failure to pay its proportionate share of CAMS, utilities, taxes and other expenses with respect to the four cotenanted premises. Complaint 7-10, 15-16. The plaintiff also claims other expenses incurred on behalf of CRSS, specifically freight and bank charges. Complaint 17; Jt. Exhs. 2-F, 2-G. In addition, Carroll Reed seeks a declaratory judgment that, should the court determine it was not constructively evicted from the Hanover, Massachusetts location, the defendants are liable pursuant to the terms of the operative sublease through the end of the lease term. Complaint 19. Further, the plaintiff seeks compensatory and punitive damages for

[1] Pursuant to 28 U.S.C. 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

fraud and misrepresentation from Leighton individually. Complaint 20-22. Finally, the plaintiff seeks to hold Leighton personally liable for all payments CRSS owes to it on the Hanover, Massachusetts sublease. Complaint 18.[2]

The defendants offer affirmative defenses that the plaintiff is barred from bringing suit by the doctrines of unclean hands and set-off and by its contributory negligence in dealing with lessors. Answer and Counterclaim -- Affirmative Defenses 2-4. Defendant CRSS counterclaims for conversion of its inventory, fixtures and equipment as the result of being locked out of its Hanover, New Hampshire store. Answer and Counterclaim -- Counterclaim 1-9.[3] Defendant Leighton seeks damages for breach of contract and fraud with respect to the plaintiff's alleged failure to pay rent, CAMS and other expenses related to its lease with Freeport Retail Partners (``FRP"), of which Leighton is successor in interest. Answer and Counterclaim -- Counterclaim 14-21.

[2] The complaint also contains a claim against CRSS for conversion of the leasehold interests, CAMS and other occupancy expenses. Complaint 23-24. The plaintiff did not pursue this claim at trial or afterwards. *See* Plaintiff's Memorandum of Law in Support of its Answer to Defendants' Motion for Sanctions (Docket No. 81) at 7.

[3] The counterclaim also contains a claim for defamation resulting in loss of prestige and business reputation. Answer and Counterclaim -- Counterclaim 10-13. The defendants abandoned this claim at trial. Trial Transcript Vol. I pp. 193-94.

A bench trial was held before me on March 17-18 and April 2, 1993. Findings of fact and conclusions of law follow.[4]

I. FINDINGS OF FACT

Carroll Reed is a Delaware corporation with headquarters in Pennsylvania. Complaint 1; Answer 1. CRSS, which now does business as Tuckerman's Outfitters, maintains its corporate offices in Maine. Complaint 2; Answer 2. Leighton was at all relevant times the president and chief executive officer of CRSS, responsible for directing the company's day-to-day operations, controlling the business and making major decisions. Trial Transcript Vol. III p. 245.

On August 24, 1990 the plaintiff, then known as CR Acquisitions, purchased the assets of the women's wear division of a corporation then known as Carroll Reed, Inc. (``Old Carroll Reed") from its owner, CML Group. Trial Transcript Vol. I pp. 58-59. Prior to the purchase, Old Carroll Reed had two divisions for accounting purposes, one selling women's wear through mail order and retail stores, and the other selling skis, boots and soft goods related to skiing. *Id*. at 53-54. Some of the stores sold both women's wear and ski goods. *Id.* at 53. On September 20, 1990 CRSS, headed by Leighton, purchased the ski division of Old Carroll Reed from CML Group. *Id.* at 59.

As part of Carroll Reed's purchase of the women's wear division, it acquired approximately fifty retail locations by means of lease assignments, including locations in which both divisions had conducted business. *Id.* at 59-60. Since CRSS desired to do business in some of these locations, Carroll Reed and CRSS executed written sublease agreements that allowed CRSS to continue to

[4] CRSS informed this court on October 27, 1993 that a petition for bankruptcy had been filed on its behalf on October 25, 1993. Counsel for parties other than CRSS agreed that, in light of CRSS's stated intention to seek relief in the Bankruptcy Court from the automatic stay so as to allow this court to decide and liquidate all of the pending claims, this court should await the outcome of the motion for relief before deciding those aspects of the case which do not involve CRSS in order to avoid piecemeal decision making. *See* Report of Conference of Counsel and Order (Docket No. 86). The court was advised on December 27, 1993 that the requested relief had been granted. *See* Order of Relief From Stay (Docket No. 87).

occupy portions of its retail space as a subtenant. *Id.* pp. 60-61. The premises subject to these subleases are located at Hanover, New Hampshire (also known as ``Galleria"), Hanover, Massachusetts (also known as ``South Shore"), Lincoln, New Hampshire (also known as ``Loon") and Winooski, Vermont (also known as ``Champlain Mall"). *Id.* at 68. Although CRSS did not acquire the ski division of Old Carroll Reed until September 20, 1990, the four subleases all had a commencement date of August 24, 1990. Jt. Exh. 1-A pp. 202-03; Jt. Exh 1-B pp. 585-86, 709-10; Jt. Exh. 1-C pp. 863-64.

Leighton negotiated the terms of the subleases with Scott Beaumont, then chief operating officer of Carroll Reed, and with Brian Lynch, to whom Beaumont had delegated some of the negotiating responsibility. Trial Transcript Vol. I pp. 49, 61-62. Prior to execution of the subleases, Leighton was aware that CRSS was obligated to pay a pro rata share of expenses based on square footage. *Id.* at 62, 66. Some ``small issues" concerning proration were resolved and reflected in the sublease agreements. *Id*. at 66-67. Leighton personally guaranteed the sublease for the Hanover, Massachusetts location. Jt. Exh. 1-B pp. 582-84.

Carroll Reed and CRSS also entered into four cotenancy arrangements to share space within the same premises at certain locations. Trial Transcript Vol. I. pp. 72-73. These locations are North Conway, New Hampshire, Acton, Massachusetts and Portland and Freeport, Maine. *Id.* at 73. CRSS, through Leighton, agreed to reimburse the plaintiff for its proportionate share of common area maintenance, utilities, taxes and other expenses incurred at the cotenanted premises. Complaint 7; Answer 7. Just as Old Carroll Reed had done, Carroll Reed received bills for utilities and occupancy related expenses and paid them directly to the provider. Trial Transcript Vol. I p. 88. The bills as received were not segregated as to women's wear and ski goods. *Id.*

The usual procedure employed by Carroll Reed for paying bills involved a coding of each invoice by its accounts payable department based on the nature of the item and relevant location. Trial Transcript Vol. III p. 47. Allocation was made of that portion for which CRSS was responsible based on occupied square footage. Trial Transcript Vol. II pp. 152-55; Trial Transcript

Vol. III pp. 47-48. Invoices were then forwarded to the vice-president of retail operations who would review the coding for accuracy and approve the bill. Trial Transcript Vol. III p. 48. All checks were manually signed and the invoices again reviewed for accurate coding. *Id.* For the period August 24, 1990 through September 30, 1990 Carroll Reed paid some of the bills from an account maintained by CML Group. Trial Transcript Vol. II pp. 156-57.

Carroll Reed sent bills to CRSS summarizing the expenses it had paid on its behalf, the first dated November 2, 1990. Trial Transcript Vol. I pp. 172, 181; Exh. P-11. The first

bill covered invoices received and paid during the period August 24, 1990 through October 31, 1990. Trial Transcript Vol. I p. 172; Exh P-11. Although at times CRSS questioned certain itemized expenses, at no time did it object to the concept of being billed for cotenancy expenses or advise Carroll Reed that it did not want to continue paying these expenses. Trial Transcript Vol. I pp. 92-100; Trial Transcript Vol. III p. 258. In January 1991 Leighton did tell Carroll Reed's Scott Beaumont that he intended to install a separate security system for the ski portion of the North Conway store. Trial Transcript Vol. I p. 92. This change was never made. *Id.*

A second bill was sent, dated February 6, 1991. *Id.* at 180-81; Exh. P-12. This second bill was for joint expenses paid by Carroll Reed in November and December of 1990. Exh. P-12. In March or April 1991 Leighton informed Beaumont that he wanted to separately meter the utilities and heat at the Freeport location. Trial Transcript Vol. I p. 94. This was never done. *Id.* at 94-95. A Carroll Reed representative orally notified Clayton Kyle of CRSS of the delinquencies in March and April of 1991. *Id.* at 108-09. In May or June of 1991 Beaumont discussed with Leighton ``cleaning up" the base rent for the subtenancies. *Id.* at 109.

Carroll Reed sent a third bill, dated May 13, 1991, for rents due for February through May of 1991 for the four subleased locations, Exh. P-13, and a fourth, dated July 24, 1991, for base rent for the period August 25, 1990 through August 31, 1991, CRSS's prorated share of utility expenses for the period August 25, 1990 through June 30, 1991 and miscellaneous freight and bank fees for the period August 25, 1990 through July 23, 1991, Exh. P-14. The July 24, 1991 bill described the total amount due as $152,505, of which

$145,336 was said to be past due and $7,169 represented base and other minimum rent for the month of August 1991 due on August 1, 1991, but noted an outstanding current lease obligation of $160,257. Trial Transcript Vol. I p. 186; Exh. P-14. Clayton Kyle, comptroller of CRSS, indicated that the company had no problem with the base rent or CAMS but requested additional information concerning the utility charges. Trial Transcript Vol. I pp. 187-88. On August 16, 1991 Jack Vogel, the comptroller of Carroll Reed, sent CRSS the detailed information it used for compiling the utility costs for the period August 25, 1990 though June 30, 1991. *Id*. at 108; Exh. P-15. As no payments were made on any of the outstanding amounts, formal default letters concerning the four subleased premises were sent to CRSS on August 23, 1991. Trial Transcript Vol. I pp. 109-10; Exhs. P-16, P-17, P-18, P-19.

Meanwhile, Carroll Reed made its last rent payment to FRP, the landlord of the Freeport premises, on February 12, 1991. Trial Transcript Vol. I p. 182-83. CRSS's Leighton is the surviving partner of FRP. Trial Transcript Vol. III p. 119. In June 1991 Leighton raised the issue of unpaid Freeport rent with Beaumont, who then indicated that the nonpayment represented a set-off for CRSS arrearages. *Id.* at 184. Sometime after July 24, 1991 Beaumont contacted Leighton, stating that if Carroll Reed received $100,000 by certified check or wire transfer within a week, it would not begin any legal proceedings. *Id.* at 188, 198-99.

A. HANOVER, MASSACHUSETTS SUBLEASE

Leighton personally guaranteed CRSS's sublease covering the Hanover, Massachusetts location. Jt. Exh. 1-B pp. 582-84. The sublease had a stated term running from August 24, 1990 through July 31, 1994. *Id*. at 588. Through February 28, 1991 CRSS was to occupy slightly more than half of Carroll Reed's leased premises, and from March 1, 1991 through the end of the sublease it was to occupy the entire premises. *Id*. at 590. The amount of fixed rent due beginning March 1, 1991 reflected this increase in the size of the leasehold. *See id*. at 588.

In the third week of March 1991, Beaumont and Kyle had a telephone conversation in which Beaumont stated that there was a delinquency in the rent. Trial Transcript Vol. I p. 104. Kyle responded that there ``shouldn't be any" because CRSS had ``cut [its] own deal" with the landlord, George Williams. *Id.* at 103-04. Beaumont told Kyle that this did not supersede Carroll Reed's obligation to the landlord. *Id.* at 104. In April 1991 Kyle sent a letter to Lynch, then director of stores for Carroll Reed, stating that the letter confirmed CRSS's agreement with Williams to the effect that the landlord would accept a monthly payment from CRSS as fulfillment of the rental obligation for the Hanover, Massachusetts space. *Id.* at 103, 105. Beaumont then called Kyle, telling him that Carroll Reed needed a release from the landlord in order for its own obligation to cease. *Id.* at 104. Carroll Reed never received acknowledgement from Williams of the asserted modification, although Kyle's letter to Williams had stated that CRSS had requested that Williams inform Carroll Reed of his acceptance of the agreement. *Id*. at 104-05; Exh. P-10. As of April 10, 1991, the date of Kyle's letter to Lynch, Carroll Reed had already made the March and April 1991 rent payments. Trial Transcript Vol. I p. 106. The April payment was the last made to Williams by Carroll Reed. *Id.*

In May 1991 Carroll Reed received a communication from Williams concerning the lease, to which Carroll Reed responded that it had been constructively evicted. *Id*.; Exh. D-19. Although Carroll Reed had an agreement with CRSS to the effect that CRSS would occupy part of the space as a subtenant through February 29, 1991 and then occupy the full amount of space beginning March 1, 1991 through the end of the lease term, tenants other than either Carroll Reed or CRSS were occupying at least a portion of that space as of March 1, 1991. Trial Transcript Vol. I p. 107; Exh. D-19. Since making its allegation of constructive eviction and ceasing its rent payments, Carroll Reed has not received any response from its landlord. Trial Transcript Vol. I p. 106-07. By letter dated August 23, 1991 Carroll Reed, through counsel, notified CRSS of its default under the sublease for failing to pay base rent and CAMS. Exh. P-16. The notification also made demand upon Leighton pursuant to his personal guaranty of the sublease. *Id.*

B. HANOVER, NEW HAMPSHIRE SUBLEASE

The Hanover, New Hampshire sublease had a stated term running from August 24, 1990 through November 30, 1995. Jt. Exh. 1-B pp. 709, 712. The rent included base rent plus five percent of annual gross sales over a breakpoint. *Id.* at 712. For the period August 24, 1990 through November 30, 1992 the base rent was $23 per square foot plus five percent of gross sales over $652,900. *Id.* The sublease premises were located inside a mini-mall called the Hanover Galleria. Trial Transcript Vol. III pp. 95-96. CRSS occupied a separate space with its own entrance. *Id*. at 96. An internal doorway connected CRSS to Carroll Reed. *Id*.

In March 1991 Leighton spoke with Brian Lynch of Carroll Reed about the deteriorating market conditions plaguing the Galleria. Trial Transcript Vol. III pp. 96-97.

In June 1991 Beaumont had a conversation with Leighton concerning CRSS's rent delinquencies for the Galleria sublease. Trial Transcript Vol. I p. 112. During that discussion, Leighton told Beaumont that the Hanover, New Hampshire location was one that ``we'd all like to be rid of." *Id.* at 113. At that time the location had a low occupancy rate, with approximately eight vacancies including one left by a major retailer, Campion. *Id*. CRSS took the position that the landlord, Hanover Galleria Associates (``Galleria Associates"), had breached the prime lease as of February 28, 1991 because retail tenants were leaving and the premises were being converted into offices. Trial Transcript Vol. I p. 111; Trial Transcript Vol. III p. 97. However, CRSS never sent a written notice of default as required by the lease to either Carroll Reed or Galleria Associates. Trial Transcript Vol. II p. 61; Trial Transcript Vol. III p. 265; Jt. Exh. 1-B p. 736. CRSS stopped paying rent on the Galleria premises in April 1991. *See* Defendants' Post Trial Reply Brief at 10 (Docket No. 74).

As of June 1991 Carroll Reed had not attempted to negotiate with the landlord to terminate or modify the lease, but Beaumont, through Lynch, told Leighton that because traffic was slow, if Leighton would come current with all arrearages, Carroll Reed would release him from his subtenant obligations at that location. Trial Transcript Vol. I p. 114. The arrearages were not paid. *Id.* In February 1992 Beaumont met with Alan Roy, president of the asset management company representing Galleria Associates, to discuss early termination of the lease. *Id*. at 116, 118. Roy told him that Bank East, a partner in Galleria Associates, was insolvent and had been taken over by the RTC. *Id.* at 116. As Roy indicated that the landlord preferred to do the termination in one piece rather than two,

Beaumont submitted an early termination proposal by which Carroll Reed would pay a penalty of $50,000 to terminate in December 1992. *Id.* at 118-19. Representatives of the asset management company told Beaumont that they could not get approval of the termination because the RTC had not assigned anyone to take charge of divestiture of Bank East's assets and that ``that process was going to take some time." *Id.* at 119. Carroll Reed ceased paying rent in May 1992 because ``it just became clear to [Beaumont] that there was no decision-making mechanism at the landlord." *Id.* Carroll Reed notified the landlord that it considered the lease terminated because of Galleria Associates' unresponsiveness and insolvency, *id.*, citing in particular the lack of accounting to tenants for use of the promotion and marketing fund as provided in the lease, violation of good faith and bargaining in promoting the center and the low occupancy, *id*. at 119-20. As of trial, no lease termination agreement had occurred. *Id.* at 120.[5]

CRSS continued to occupy the Galleria until late August 1991. *Id.* From that time until May 1992 Carroll Reed continued to pay both rent and CAMS for the entire space. *Id.* By letter dated August 23, 1991 Carroll Reed notified CRSS that it was in default and that the sublease was terminated pursuant to the terms of the sublease agreement. *Id.* at 204; Exh. P-18. The default notice instructed CRSS that it was required to surrender the premises immediately pursuant to the sublease agreement. Exh. P-18; Jt. Exh. 1-B p. 732. CRSS did not contest the default notice. Trial Transcript Vol. III p. 273.

[5] After the trial, however, Carroll Reed consummated a buy out with the landlord for the remainder of the lease term. *See* Plaintiff's Memorandum of Law in Respect to Proposed Findings of Fact and Conclusions of Law at 11 n.4 (Docket No. 63).

On August 28, 1991, two days after its receipt of the default notice, CRSS, in the process of collecting merchandise for its annual tent sale, attempted to remove inventory from the Galleria location. *Id*. at 272, 274-75. CRSS did not notify Carroll Reed of its intentions to take the inventory prior to its actions. *Id*. at 275. During CRSS's efforts to procure its wares, someone from Carroll Reed locked the doors to the Galleria store and prevented CRSS's representatives from gaining access to the premises. Trial Transcript Vol. I p. 205; Trial Transcript Vol. III pp. 71, 103, 276. Although it is unclear from the record who specifically effectuated the lockout, the plaintiff admits that CRSS was indeed prevented from removing goods as a result of being locked out by someone from Carroll Reed. *See, e.g.*, Trial Transcript Vol. III pp. 103-06. Carroll Reed did not use any legal process to effectuate this lockout. Trial Transcript Vol. I p. 205.

Following an agreement between the attorneys for Carroll Reed and CRSS, Trial Transcript Vol. III pp. 103-04, the premises were unlocked and CRSS representatives were allowed to remove certain inventory, but not any fixtures, rental equipment or machines, *id*. at 104-06, 277; Trial Transcript Vol. I p. 209. After removing the released portion of its inventory, CRSS made no further request to get its remaining property back. *Id.* at 230-31; Trial Transcript Vol. III p. 71. Carroll Reed made no offer to return the withheld property until November 30, 1992. Trial Transcript Vol. III pp. 53-55; Exh. P-22. Carroll Reed offered to return all the remaining items at that time because it intended to vacate the Galleria store at the end of January 1993 and did not want to store them or pay to have them moved to some other location. Trial Transcript Vol. III pp. 71-72. CRSS indicated that it had no interest in taking these items at that point due to their depreciated value and possible deteriorated condition. *Id*. at 240-41. The remaining assets consisted of rental skis, boots and poles and various fixtures, equipment, machinery and other items. *See generally id.* at 158-223; Exh. D-8 at 3. Carroll Reed then hired a third-party auctioneer. Trial Transcript Vol. I p. 231. The items were inventoried for auction. Trial Transcript Vol. III p. 107; Exh. D-8 at 3. An auction was held January 15-16, 1993, which generated gross sales of $10,875.50 and net proceeds to Carroll Reed of $7,807.95. Exh. D-8 at 1.

C. LINCOLN, NEW HAMPSHIRE SUBLEASE

The original term of the Lincoln, New Hampshire sublease covered the period August 24, 1990 to October 1, 1999. Jt. Exh. 1-C at 863, 865. By a letter agreement dated June 13, 1991 Carroll Reed terminated the prime lease with its landlord, Lincoln Mill Associates. Exh. P-8. The agreement called for the assignment of CRSS's sublease to Lincoln Mill by June 25, 1991. *Id.* In accordance with the agreement, Carroll Reed continued to occupy the Lincoln location through October 31, 1991. Trial Transcript Vol. II p. 34; Exh. P-8. CRSS also occupied the Lincoln store through October 31, 1991. Trial Transcript Vol. II p. 35. By letter dated August 23, 1991 Carroll Reed notified CRSS of its default under the Lincoln sublease for an arrearage in rent and other charges. Exh. P-19.

D. WINOOSKI, VERMONT SUBLEASE

The sublease for the Winooski, Vermont location ran from August 24, 1990 through August 15, 1991. Jt. Exh. 1-A p. 202. The premises consisted of an interior shop in the Champlain Mill mall. Trial Transcript Vol. III p. 108. The CRSS and Carroll Reed stores each had a separate entrance from the mall. *Id.* A dividing wall with a doorway connected the two stores. *Id.*

Prior to the expiration of the sublease, Carroll Reed extended the prime lease through January 31, 1992. Exh. P-9. Notwithstanding the expiration of the sublease on August 15, 1991, CRSS continued to occupy the Winooski premises with Carroll Reed through the spring of 1992. Trial Transcript Vol. III pp. 108-09. By letter dated August 23, 1991 Carroll Reed notified CRSS of its default under the Winooski sublease for an arrearage in rent and other charges. Exh. P-17.

E. FREEPORT, MAINE COTENANCY

Carroll Reed leased retail space in Freeport, Maine from FRP pursuant to a lease agreement dated December 11, 1989, as amended August 24, 1990. Jt. Exh. 1-C pp. 1226, 1231, 1232. The term of the lease ran from September 1, 1989 through August 31, 1992. *Id*. at 1226. Defendant Leighton is the surviving partner of the landlord, FRP. Trial Transcript Vol. III p. 119. Beginning in February 1991 Carroll Reed stopped paying rent to FRP as a set-off against the increasing rental obligations owed by CRSS and Leighton. Trial Transcript Vol. I pp. 182-83; Trial Transcript Vol. II p. 179; Trial Transcript Vol. III pp. 73-74. On October 25, 1991 FRP, through counsel, informed Carroll Reed that it was in default of its rental obligations in Freeport and declared the lease terminated. Exh. P-24. Although the letter directed Carroll Reed to vacate the premises immediately, *id.*, it continued to occupy the Freeport premises through the end of October 1992, Trial Transcript Vol. I p. 226; Trial Transcript Vol. III pp. 72-73. At trial, Carroll Reed stipulated that CRSS and Leighton are entitled to set-off the amount Carroll Reed is found to owe on the Freeport lease against the amount CRSS and Leighton are found to owe Carroll Reed for the seven other locations. Trial Transcript Vol. III pp. 3-4.

F. ACTON, MASSACHUSETTS COTENANCY

The Acton, Massachusetts location was a freestanding store shared by Carroll Reed and CRSS with separate entrances and partitioned interior access. *Id*. at 116-17. The only occupancy expense for the Acton location that CRSS presently contests is Carroll Reed's claim for garbage service. *See* Defendants' Post Trial Reply Brief at 29.

G. NORTH CONWAY, NEW HAMPSHIRE COTENANCY

The North Conway, New Hampshire location consists of the front and back part of a store on Main Street. Trial Transcript Vol. III p. 116. The front part of the store, which abuts Main Street, is occupied by Carroll Reed. *Id*. The back part of the store, which adjoins a parking lot, is occupied by CRSS. *Id*. The two areas are separated from each other by a divider and double doors. *Id*. Both Carroll Reed and CRSS have separate entrances to their respective areas. *Id*. Through trial, Carroll Reed and CRSS continued to co-occupy the North Conway, New Hampshire location, and Carroll Reed continued to pay the entire North Conway operating expenses. Trial Transcript Vol. II p. 75. The only occupancy expense for the North Conway location that CRSS now contests is Carroll Reed's claim for cleaning services. *See* Defendants' Post Trial Reply Brief at 30.

H. PORTLAND, MAINE COTENANCY

The Portland, Maine location consisted of the front and rear portions of a building located on Congress and Free Streets. Trial Transcript Vol. III p. 118. Carroll Reed occupied that portion of the building bordering Congress Street; CRSS occupied that portion of the building bordering Free Street. *Id*. There was no internal connection between the areas of the building occupied by CRSS and Carroll Reed. *Id*. at 118-19. The only occupancy expenses for the Portland location that CRSS presently contests are Carroll Reed's claims for trash service and air conditioning service.

See Defendants' Post Trial Reply Brief at 30.

I. OTHER EXPENSES

Carroll Reed incurred various expenses for security, freight and other miscellaneous items relating to the subleases and cotenancies. Jt. Exhs. 2-E, 2-F, 2-G. A number of these claims were dropped at trial. *See* Plaintiff's Proposed Findings of Fact at 17-18 (Docket No. 62). CRSS has also acknowledged responsibility for $6,083.39 of the claimed expenses.[6] *See* Defendants' Post Trial Reply Brief at 20-21. The only disputed item remaining is Carroll Reed's claim for journal tapes. *Id*.

II. CONCLUSIONS OF LAW

A. CHOICE OF LAW

Because the various leaseholds and cotenancies exist in several states, this case poses a preliminary choice of law question. This court, sitting in diversity, is bound to apply Maine's choice of law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Maine Surgical Supply Co. v. Intermedics Orthopedics, Inc.*, 756 F. Supp. 597, 600 (D. Me. 1991). Maine follows the Second Restatement's flexible, ``most significant relationship" approach to choice of law questions. *See Baybutt Const. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914, 918 (Me. 1983), *overruled on other grounds*, *Peerless Ins. Co. v. Brennon*, 564 A.2d 383 (Me. 1989); *Beaulieu v. Beaulieu*, 265 A.2d 610, 616-17 (Me. 1970); Restatement (Second) of Conflict of Laws 188 (1971). Under Maine choice of law rules, the law of the state which, with respect to a particular issue, ``has the most significant relationship to the transaction and the parties" determines the rights

[6] In fact, CRSS claims that it paid $2,161.94 of this amount. *See* Defendants' Post Trial Reply Brief at 20. It receives credit for this in the final calculation of damages. *See* Jt. Exh. 2-H (``other locations"); *infra* p. 45.

and duties of the parties. *Baybutt*, 455 A.2d at 918.

Though no Maine court has addressed this specific issue, I conclude that under Maine choice of law doctrine the substantive law of the state where the real property is located should govern the interpretation of the various subleases and cotenancy agreements. *See* Restatement (Second) of Conflict of Laws 189, 190 cmt. e, 222; *see also Manella v. Brown Co.*, 537 F. Supp. 1226, 1228 (D. Mass. 1982) (``Since the property which is the subject of the lease in question is located in the State of Maine, this court must apply the laws of that state in determining rights relating to that property."); *United States Trust Co. of N.Y. v. Boshkoff*, 148 Me. 134, 141 (1952) (``The law of the State in which land is situated controls . . . the construction of instruments intended to convey it."); *Bates v. Decree of Judge of Probate*, 131 Me. 176, 179 (1932) (``As far as real estate . . . is concerned, the laws of the State where it is situated furnish the rules which govern . . . the construction, validity and effect of conveyances thereof, and the capacity of the parties to such contracts or conveyances, as well as their rights under the same."). Under the Second Restatement's choice of law principles, the state in which real property that is the subject matter of a tenancy is located would generally have the most significant relationship to agreements or arrangements affecting that property. *See* Restatement (Second) of Conflict of Laws 189 cmt. c. This is true here. Although the written subleases were negotiated and executed in Maine by two Maine entities, the agreements at issue, both oral and written, involve interests in real property located in various states. Accordingly, the state where the subject property is situated has a more significant relationship than Maine, as the place of negotiation and agreement, to issues concerning the rights and duties of the parties relating to that property. *See id.* Therefore, to the extent necessary, the law of the place of the real property will govern the interpretation of the various issues surrounding the subleases and cotenancies.

B. THE SUBLEASES

1. *August and September 1990 Rent*

The first issue presented concerning the subleases is the date rental obligations began to accrue. CRSS argues that it is not liable for base rent for August and September 1990. *See* Jt. Exh. 2-B pp. 1-3. In addition, CRSS now only opposes those claimed CAMS that relate to the August and September 1990 time period. *See* Defendants' Post Trial Reply Brief at 20. Although the subleases, which were executed by CRSS on September 20, 1990, have an effective date of August 24, 1990, CRSS takes the position that the August and September rent and CAMS were paid by its predecessor, CML Group, prior to CRSS's purchase of the ski division on September 20, 1990. Accordingly, CRSS contends that it is not liable for the August and September rent and CAMS because they have already been paid to the landlord.

Regardless whether CML Group paid the August and September 1990 rent for the ski division prior to CRSS's acquisition, CRSS is nevertheless liable under the subleases for rent from August 24, 1990. When the language is clear and unambiguous, a lease must be construed according to its express terms. *See Addison County Automotive., Inc. v. Church*, 481 A.2d 402, 405 (Vt. 1984); *Great Atl. & Pac. Tea Co. v. Yanofsky*, 403 N.E.2d 370, 375 (Ma. 1980); *Erin Food Servs., Inc. v. 688 Properties*, 401 A.2d 201, 203 (N.H. 1979). Consequently, based on a plain reading of the subleases, CRSS is liable for rent, which includes base rent, CAMS and other express obligations, beginning on August 24, 1990, the effective date of the subleases.

Moreover, I note that this construction of the subleases is consistent with the other evidence in this case. There appears to be no dispute that CML Group paid the August and September 1990 rent for the ski divisions prior to CRSS's acquisition. Trial Transcript Vol. I p. 175. However, Carroll Reed purchased this prepaid rent when it acquired the various retail locations from CML Group on August 24, 1990. *Id*. at 253, 256. Consequently, the imposition of rental liability for August and September 1990 under the express terms of the subleases does not provide Carroll Reed with an undeserved windfall since prepaid rent for the ski division was a corporate asset it purchased from CML Group.

2. *Hanover, Massachusetts*

There are a number of issues surrounding the Hanover, Massachusetts sublease. The first issue concerns CRSS's liability for rent under the sublease. The term of the sublease is stated to run through July 31, 1994. Beginning in March 1991, however, CRSS unilaterally ceased paying its sublease rent to Carroll Reed and instead began paying rent directly to the prime landlord. CRSS notified Carroll Reed that it had reached an agreement with the prime landlord concerning rent payments. Despite its overtures to the contrary, CRSS never obtained a written release for Carroll Reed from the landlord. Consequently, regardless of CRSS's payments to the landlord, Carroll Reed remains exposed to liability to the landlord pursuant to the prime lease. Carroll Reed made its rental payments under the prime lease for March and April 1991 but stopped paying rent as of April 1991 due to its claim of constructive conviction. CRSS has never been released from its obligations under the sublease.

In light of the express terms of the sublease and the facts surrounding Carroll Reed's termination of rental payments to the landlord, CRSS is liable to Carroll Reed for sublease rent through at least April 1991. *See* Jt. Exh. 2-A p. 2; Jt. Exh. 2-B p. 1. Pursuant to my earlier ruling, CRSS is also liable for rent and CAMS for the August and September 1990 period. Moreover, I find appropriate the issuance of a declaratory judgment concerning CRSS's continuing liability under the sublease. *See, e.g., Gilbert, Segall & Young v. Bank of Montreal*, 785 F. Supp. 453, 459-63 (S.D.N.Y. 1992) (declaratory judgment action proper for determining future rental liability under lease). Carroll Reed's liability exposure for rent pursuant to the prime lease persists to the present date despite CRSS's direct payments to the landlord. CRSS cannot unilaterally decide to pay rent to a third party and hope to avoid accountability if, for example, it should stop making those payments. A declaratory judgment in this regard will clarify CRSS's continuing liability under the sublease and terminate the uncertainty and insecurity surrounding CRSS's decision to make direct

payments to the landlord without securing a written release for Carroll Reed. *See Auburn Police Union v. Tierney*, 756 F. Supp. 610, 619 (D. Me. 1991). Therefore, if and to the extent Carroll Reed is ever found liable under the prime lease subsequent to April 1991, CRSS remains correspondingly liable to Carroll Reed under the sublease. 28 U.S.C. 2201.

The second issue surrounding the Hanover, Massachusetts sublease is a claim for CAMS and other joint occupancy expenses. Carroll Reed claims that CRSS owes $1,823.87 for CAMS and $937.16 in joint occupancy expenses. Jt. Exh. 2-C p. 1; Jt. Exh. 2-D p. 12. CRSS originally disputed charges of $542.89 for CAMS and $119.08 for joint occupancy expenses. Jt. Exh. 2-C p. 1; Jt. Exh. 2-D p. 12. Recently, however, CRSS has acknowledged responsibility for $1,708.52 for CAMS and an additional $46.98 for joint occupancy expenses. *See* Defendants' Responsive Proposed Findings of Fact at 5-6 (Docket No. 75); Defendants' Post Trial Reply Brief at 23-24. Therefore, the amounts currently in dispute are $115.35 for CAMS and $72.10 for joint occupancy expenses.

The basis for the dispute with respect to the remaining CAMS is apparently the timing of the charges. *See* Trial Transcript Vol. II pp. 63-67; Jt. Exh. 2-C p. 1 (basis of dispute). CRSS claims that the disputed charges relate to time periods for which it was not responsible for CAMS under the sublease. However, because I conclude that CRSS is liable under the sublease from August 24, 1990 through April 30, 1991, the timing question is no longer at issue. CRSS is liable for the full amount of the claimed CAMS. *See* Jt. Exh. 2-A p. 2 (summary).

CRSS presently disputes $72.10 in window cleaning and carpet service charges. *See* Defendants' Post Trial Reply Brief at 24. The basis for this dispute is that no service was provided to CRSS. Jt. Exh. 2-D p. 12 (basis of dispute). The original invoices do not indicate that the services were rendered to CRSS or benefitted CRSS in any way. *See* Jt. Exh. 1-B pp. 684, 691, 705. Because Carroll Reed presented no evidence regarding the configuration of the South Shore location, other than a general floor plan, *see id.* 653-54, I cannot conclude whether CRSS would have received any benefit from window cleaning or carpet service provided to Carroll Reed.

Carroll Reed has failed to sustain its burden of proof on these claims.

The final issue relating to the Hanover, Massachusetts lease is the effect of defendant Leighton's personal guaranty of the sublease. Leighton does not deny the validity of the guaranty. *See* Defendants' Post Trial Reply Brief at 37. He simply claims that there is no default in the sublease for which he would be liable under the guaranty. *Id.*

The guaranty requires Leighton personally to pay the rent due to Carroll Reed upon any default by CRSS in its payments. Jt. Exh. 1-B p. 582. The guaranty defines ``rent" as including ``any and all . . . sums and charges" payable by CRSS under the sublease. *Id.* The guaranty also waives any requirement that Carroll Reed first pursue CRSS before the guaranty is enforceable. *Id.* Pursuant to its terms, the guaranty terminated on December 31, 1991. *Id.*

CRSS has clearly defaulted on its rental obligations under the South Shore sublease by failing to pay the August and September 1990 rent and ceasing its payments to Carroll Reed in March 1991. Demand was made on Leighton by letter dated August 23, 1991, prior to the termination of the guaranty. *See* Exh. P-16. Therefore, according to the terms of the guaranty, Leighton became personally liable for all of CRSS's debts to Carroll Reed for the sublease effective August 23, 1991. This imposition of personal liability squares with Massachusetts law. Under Massachusetts law, a guarantor is collaterally liable on a debt. *Charlestown Five Cents Sav. Bank v. Wolf*, 36 N.E.2d 390, 391 (Ma. 1941). That is, a guarantor's liability is contingent upon the primary debtor's default. *See id.* Upon default, however, the liability of a guarantor is settled. *Shawmut Bank, N.A. v. Chase*, 609 N.E.2d 479, 481 (Mass. App. Ct.), *vacated in part on other grounds*, 624 N.E.2d 541 (Ma. 1993). Moreover, the parties to the guaranty can exclude any requirement that the creditor first take action against the primary debtor upon default before pursuing the guarantor. *See In re Goodman Ind., Inc.*, 21 B.R. 512, 519 n.7 (Bankr. Mass. 1982). This is the case here. Accordingly, I find that Leighton is personally liable for CRSS's rental obligations to Carroll Reed through April 1991.

3. *Hanover, New Hampshire*

There are a number of significant issues surrounding the Hanover, New Hampshire sublease, including claims of forcible eviction and conversion. I will first address the claim of unlawful eviction as this will determine CRSS's liability under the sublease for the period following the lockout.

On August 23, 1991 Carroll Reed notified CRSS of the termination of the sublease for CRSS's failure to pay rent. Exh. P-18. At that time, CRSS was unquestionably in default under the sublease due to its refusal to pay rent despite repeated demands. By statute, Carroll Reed had the right to terminate the Hanover, New Hampshire tenancy by giving CRSS a notice in writing to quit the premises. N.H.R.S.A 540:2(II)(a), 540:3. This is exactly what Carroll Reed did. However, this is also where Carroll Reed's compliance with New Hampshire law ended. Five days after serving the notice to quit, on August 28, 1991, someone from Carroll Reed physically prevented CRSS from gaining access to the premises.[7]

This it could not do. By statute, CRSS had a minimum of seven days to act or respond to Carroll Reed's notice to quit. N.H.R.S.A. 540:3. Because the minimum statutory period had not yet elapsed, CRSS could not be forced to vacate the Hanover premises on August 28, 1991. *See O'Dowd v. Heller*, 134 A. 344, 345 (N.H. 1926); Restatement (Second) of Property, Landlord and Tenant, 14.2(1) (1977). With one possible exception not applicable here, New Hampshire has never sanctioned the use of self-help by lessors to forcibly evict tenants for defaults in rent payment. Instead, at common law an action for ejectment and entry has always been available to landlords as a means of regaining possession of demised real estate. N.H.R.S.A. 540:26; *Cooperman v.*

[7] Although it is unclear from the record who actually locked CRSS out, it is undisputed that someone from Carroll Reed, acting on its behalf, prevented CRSS from entering the Galleria premises. Moreover, once Carroll Reed's management became aware of the lock-out, it did nothing to rectify the situation other than to allow CRSS to remove some inventory for a tent sale; Carroll Reed never offered to return possession of the leased premises to CRSS. By its subsequent inaction, Carroll Reed thereby ratified the original decision to lock CRSS out, to the extent that it was not originally sanctioned. *See* Restatement (Second) of Agency 82, 94 (1958). Under these circumstances, the actions surrounding the lock-out are fairly imputed to Carroll Reed. *Id.* 216, 218, 244.

MacNeil, 465 A.2d 879, 881-82 (N.H. 1983). And since 1843 statutory summary possessory actions have been available as well. N.H.R.S.A. 540:12; *Gibson v. Laclair*, 600 A.2d 455, 457 (N.H. 1991); *Cooperman*, 465 A.2d at 881. Under New Hampshire law, however, there is no common law remedy that permits a landlord to circumvent the legal process and resort to self-help in evicting a lawful tenant, even though there is a default in rent and a notice to quit has been served.[8] *See* Restatement (Second) of Property, Landlord and Tenant, 14.2(1) (1977). Consequently, by barring CRSS from the leased premises on August 28, 1991 without legal process, Carroll Reed's actions amounted to an unlawful, forcible eviction of CRSS and effectively terminated the sublease on that date. *See id.* 6.1(1); Jt. Exh. 1-B p. 713 (breach of covenant of quiet enjoyment).

Although the date is unclear from the record, at some point soon after Carroll Reed's unlawful eviction of CRSS, the parties, through counsel, negotiated an agreement to allow CRSS to gain access to the premises to collect a portion of its inventory. Under the terms of this agreement Carroll Reed permitted CRSS to retrieve inventory it desired to sell at a tent sale, but nothing else. Trial Transcript Vol. I p. 209; Trial Transcript Vol. III pp. 103-06, 277. Stated conversely, Carroll Reed refused to allow CRSS to remove any of its noninventory property, that is, fixtures, display cases, ski rental equipment, machines and other materials.

Because a landlord in New Hampshire has no right to seize a tenant's property for nonpayment of rent, *Hellberg v. Norris*, 84 A.2d 835, 836 (N.H. 1951); *Standish v. Moldawan*, 37 A.2d 788, 789-90 (N.H. 1944), the question arises whether Carroll Reed's refusal to allow CRSS to remove certain of its property, and its subsequent retention of that property, amounts to a

[8] I note that under New Hampshire common law a landlord may still have the right to use self-help to evict a nonresidential tenant at sufferance. *See Hill v. Dobrowolski*, 484 A.2d 1123, 1125-26 (N.H. 1984); *Weeks v. Sly*, 61 N.H. 89, 89-90 (1881); *Russell v. Fabyan*, 34 N.H. 218, 224 (1856). Nonetheless, this right, if it still exists, cannot sanction Carroll Reed's actions here. CRSS was not a tenant at sufferance; rather, it was a tenant for a specific term that had been served with a lawful notice to quit. The only way CRSS could possibly have become a tenant at sufferance under this situation was if it had remained on the premises after the expiration of the notice to quit. *See City of Dover v. B C P Realty*, 293 A.2d 599, 600 (N.H. 1972). However, because CRSS had seven days to act on the notice to quit, and Carroll Reed took action after only five days, this point is immaterial.

conversion. ``Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *Muzzy v. Rockingham County Trust Co.*, 309 A.2d 893, 894 (N.H. 1973) (citing Restatement (Second) of Torts 222A(1) (1965)). ``The interference must be of such seriousness as to justify the imposition of a forced judicial sale on the defendant." *LFC Leasing & Fin. Corp. v. Ashuelot Nat. Bank*, 419 A.2d 1120, 1121 (N.H. 1980). To resolve this question, a court applying New Hampshire law must consider such factors as ``the extent and duration of the actor's exercise of dominion and control, his intent to assert a right in fact inconsistent with the other's right of control, and his good faith." *Muzzy*, 309 A.2d at 894-95. New Hampshire has also recognized a right of ``qualified refusal" for a person in possession:

> There is no conversion if the refusal [to return another's property] is based upon a reasonable qualification or requirement, is stated in good faith, and is made known to the owner. Such refusal is known as a qualified refusal. It follows that not every failure to deliver upon demand will constitute a conversion. On the contrary, a qualified refusal for a reasonable length of time is not a conversion.

LFC Leasing & Fin. Corp, 419 A.2d at 1121 (citations omitted); *see also Hett v. Boston & Me. R.R.* 44 A. 910, 911 (N.H. 1897) (``If there is a reasonable doubt of the demandant's right to the possession of the property, a refusal to deliver it until a reasonable opportunity is had to ascertain his right is not sufficient evidence of a conversion.").

Carroll Reed's refusal to permit CRSS to remove certain of its property constituted an exercise of dominion and control over the property that seriously interfered with CRSS's ownership rights. By itself, however, this refusal does not amount to a conversion. Under the qualified refusal doctrine, Carroll Reed had a right to refuse, for the moment, to return CRSS's property if, for example, Carroll Reed entertained good faith doubts about CRSS's ownership rights in the fixtures and display cases.

Unfortunately for Carroll Reed, however, the qualified refusal defense is unavailable on the facts of this case. Assuming there was a legitimate question about the ownership of the withheld

property, Carroll Reed was permitted to retain it for a reasonable length of time so that it could investigate CRSS's ownership rights in the property. *See Stahl v. Boston & Me. R.R.*, 51 A. 176, 177 (N.H. 1901). Once it chose to withhold the property, a duty devolved upon Carroll Reed to notify CRSS within a reasonable period of time of its intentions concerning that property. *See id.* Carroll Reed, however, did not notify CRSS of its willingness to release the property until November 30, 1992 -- some fifteen months after CRSS was first prevented from removing it. *See* Ex. P-22. Fifteen months cannot by any stretch of the imagination be considered a reasonable length of time for Carroll Reed to examine CRSS's ownership rights in the retained property. *See LFC Leasing & Fin. Corp.*, 419 A.2d at 1121-22 (six weeks in which to clear up ``horrendous situation" concerning a party's security interest in three copying machines was a reasonable length of time). Carroll Reed's neglect in failing to make a timely offer to return CRSS's property thus transformed what might otherwise have been a proper qualified refusal into an improper conversion. *See Stahl*, 51 A. at 177; *Sargent v. Gile*, 8 N.H. 325, 331 (1836). Moreover, contrary to Carroll Reed's intimations, CRSS's failure to request the return of its property at some point after Carroll Reed's initial refusal to release it is irrelevant to this inquiry. Once CRSS was refused the release of its property, the ball was in Carroll Reed's court; CRSS was not required to make a subsequent demand for its return. *See Stahl*, 51 A. at 177; *Sargent*, 8 N.H. at 331. Accordingly, because Carroll Reed neglected to offer to return CRSS's withheld property within a reasonable period of time, I conclude that Carroll Reed's actions amounted to a conversion of the retained property.[9] I will address the issues concerning the scope and value of the converted property in the

[9] This is not a situation, as argued by Carroll Reed, like *Lane v. Camire*, 493 A.2d 1125 (N.H. 1985). *See* Plaintiff's Reply to Defendants' Memorandum of Law in Support of those Matters of Which They Have the Initial Burden of Proof (``Plaintiff's Reply") (Docket No. 71) at p. 4. In *Lane*, a tenant abandoned her property after unilaterally terminating her apartment lease. One month or so after the tenant's departure, the landlord, under police supervision, entered the premises, removed the tenant's remaining property and placed it in storage. Within four days, the tenant's attorney was notified of the whereabouts of her property, and the items were made available for the tenant to retrieve. On these facts, the court concluded that no conversion had occurred. *Id*. The situation in our case is quite different from the situation in *Lane*. Carroll Reed was no where near as assiduous in its dealings with its tenant's property as was the landlord in *Lane*. Indeed, unlike the *Lane* landlord, Carroll Reed made no effort to return the property, but rather let it sit until Carroll Reed decided to abandon the Galleria premises.

damages section of this opinion.

The final matter pertaining to the Hanover, New Hampshire sublease involves Carroll Reed's claims for base rent, CAMS and certain joint occupancy expenses. As with the other subleases, CRSS contests Carroll Reed's claim for rent for the August through September 1990 period. Pursuant to my earlier ruling, however, CRSS is liable for base rent and CAMS for that period. But in light of Carroll Reed's wrongful termination of the sublease on August 28, 1991, CRSS retains no liability under the sublease for any rent, CAMS or joint occupancy expenses from and after August 28, 1991.[10] For disputed joint occupancy expenses incurred prior to the eviction, CRSS acknowledges that Carroll Reed paid $722.42 on its behalf for occupancy expenses. *See* Defendants' Post Trial Reply Brief at 26. The only item presently contested by CRSS is a charge of $101.58, which CRSS states is for air conditioning service. *Id*. According to the parties' joint stipulation, however, the only $101.58 charge pertains to security monitoring services provided at the Galleria. Jt. Exh. 2-D p. 7; *see also* Trial Transcript Vol. II pp. 64-66; Jt. Exh. 1-C pp. 983, 985, 988.

Assuming that the contested $101.58 charge relates to security services -- as I must given CRSS's acknowledgment of responsibility for the remaining amount of claimed expenses -- I find that CRSS is responsible for the claimed charge. Given the nature of the security monitoring services, I conclude that CRSS benefitted from the service provided to the Galleria premises. Additionally, CRSS never attempted to have the security system turned off or disconnected. *See* Transcript of Status Conference (Docket No. 52) at 7, 9-10. Accordingly, I find that the $101.58 expense for security services was properly charged to CRSS under the sublease. *See* Jt. Exh. 1-B p. 717.

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[10] CRSS had originally claimed that its rental obligations for the Galleria premises terminated on February 28, 1991, *see* Jt. Exh. 2-B pp. 2-3, due to the prime landlord's breach of the prime lease, *see* Trial Transcript Vol. I p. 111. CRSS has subsequently abandoned this contention and adopted August 28, 1991 as the date it claims its obligations under the sublease terminated. *See* Defendants' Post Trial Reply Brief at 19 n.12.

4. *Lincoln, New Hampshire*

CRSS disputes Carroll Reed's claims for base rent, CAMS and joint occupancy expenses for the Lincoln, New Hampshire sublease. Pursuant to my earlier ruling, CRSS is liable for base rent for the August and September 1990 sublease period. *See* Jt. Exh. 2-A p. 3; Jt. Exh. 2-B p. 2. At trial, however, Carroll Reed withdrew items in the amount of $1,979.45 for CAMS incurred in August 1990. *See* Plaintiff's Proposed Findings of Fact at 13 n.2; Jt. Exh. 2-C p. 2 (Nos. 918 and 921). CRSS does not dispute Carroll Reed's claims for the remaining CAMS. *See* Jt. Exh. 2-A p. 3; Jt. Exh. 2-C p. 2.

The only remaining issue pertains to Carroll Reed's claim for disputed joint occupancy expenses totalling $1,547.28. Jt. Exh. 2-D pp. 8-9. Of this amount, CRSS acknowledges that Carroll Reed paid bills of common benefit totalling $820.68. *See* Defendants' Post Trial Reply Brief at 25. The presently disputed items are expenses for lock work performed at the Lincoln location. *Id.*[11] CRSS contends that no service was provided to it by the locksmith. Jt. Exh. 2-D pp. 8-9 (basis of dispute). The original invoices for the lock work do not indicate that the lock service benefitted CRSS in any way. *See* Jt. Exh. 1-C pp. 977, 979-80, 990-91, 995-96, 998. The invoices contain no description of where the locks were placed or for what they were to be used. *See id.* Carroll Reed elicited no testimony regarding the location or purpose of the lock service. Accordingly, it has failed to meet its burden of proof on these claims.

5. *Winooski, Vermont*

CRSS contests certain claims for base rent, CAMS and joint occupancy expenses for the

[11] I note a discrepancy between the joint submission's calculation for lock work at Loon Mountain and CRSS's calculation. *Compare* Jt. Exh. 2-D pp. 8-9 *with* Defendants' Post Trial Reply Brief at 25. Reviewing the actual bills, it appears that CRSS is in error. The total amount of lock work performed at Loon presently claimed by Carroll Reed is $181.72. *See* Jt. Exh. 2-D pp. 8-9; Plaintiff's Proposed Findings of Fact at 13 n.2 ($.76 claim withdrawn). I will use this figure in calculating damages.

Winooski, Vermont location. Pursuant to my earlier ruling, CRSS is liable for rent for the August and September 1990 sublease period. As for the contested CAMS, Jt. Exh. 2-C p. 3 (Nos. 274 and 293), I find sufficient evidence from the invoices and the testimony of John Vogel that these claims are for CAMS incurred during the sublease term and were properly allocated to CRSS according to the terms of the sublease. Trial Transcript Vol. II pp. 37-42; Jt. Exh. 1-A pp. 225, 274, 293 (percentages). CRSS is thus liable for the full amount of the claimed rent and CAMS for the Champlain Mills location. *See* Jt. Exh. 2-A p. 1.

As for the joint occupancy expenses, CRSS originally disputed $1,906.08 of the claimed expenses. Jt. Exh. 2-D pp. 4-5. After trial, however, CRSS acknowledged responsibility for $1,747.16. *See* Defendants' Post Trial Reply Brief at 23. Consequently, the amount currently in dispute is $158.92. *See id.* at 22. The disputed expenses relate to music, security and trash service incurred during the sublease term. Jt. Exh. 2-D p. 4 (Nos. 297, 307 and 318). As with the other locations, CRSS claims that these services were not provided to it and that it received no benefit from them. Jt. Exh. 2-D p. 4 (basis of dispute).

I find, however, sufficient record proof that the contested operating services were provided to CRSS and that it received a corresponding benefit. The music service charges (Jt. Exh 1-A pp. 308-09) were for music that was piped into the premises. *See* Trial Transcript Vol. II p. 43, 47-49. This music was received into the ski area, Trial Transcript Vol. III pp. 125, and CRSS never took any action to have it turned off or disconnected, *see* Trial Transcript Vol. II pp. 47-49; Transcript of Status Conference at 6, 9-10. The security service charge (Jt. Exh. 1-A p. 298) was the annual fee for security monitoring at the Champlain Mill location. Trial Transcript Vol. II pp. 42. CRSS received the protection of the security monitoring, *see id.*, and made no effort to have the system removed from its portion of the premises, *see id.* at 47-49; Transcript of Status Conference at 7, 9-10. Also, the sublease specifically lists security monitoring as a ``Common Areas and Facilities Costs" for which CRSS agreed to pay its pro rata share. Jt. Exh. 1-A p. 223, 224. The trash service charge (Jt. Exh. 1-A p. 319) was for the rubbish removal from the location. Trial Transcript Vol. II

p. 50. CRSS provided no evidence of how it otherwise disposed of its rubbish. *Id*. at 50-51; Trial Transcript Vol. III 250-51; Transcript of Status Conference at 7, 9-10. The sublease also enumerates rubbish removal as a ``Common Areas and Facilities Costs" for which CRSS agreed to pay its pro rata share. Jt. Exh. 1-A p. 223, 224. Based on this evidence, I conclude that CRSS is liable for the full amount of the claimed joint occupancy expenses for the Champlain Mill location, including the music, security and trash service charges. *See* Jt. Exh. 2-A p. 1 (summary).

C. THE COTENANCIES

The majority of the issues surrounding the cotenancies involve Carroll Reed's claims for joint occupancy expenses. Like the subleases, CRSS contests many of Carroll Reed's charges. Unlike the subleases, however, CRSS has conceded its general responsibility for the joint occupancy expenses for the cotenancies. In its answer to Carroll Reed's complaint, CRSS admitted the following allegation: ``CRSS, acting by and through Leighton, agreed to reimburse plaintiff for CRSS' proportionate share of common area maintenance, utilities, taxes and other expenses incurred at the Co-Tenanted Premises, which expenses were being paid by plaintiff." *See* Complaint 7; Answer 7. CRSS is bound by this admission. *Schott Motorcycle Supply, Inc. v. American Honda Motor Co.*, 976 F.2d 58, 61 (1st Cir. 1992). CRSS is thus liable for its proportionate share of the joint occupancy expenses incurred at the cotenancy locations. Implicit in the words ``proportionate share," however, is the understanding that CRSS is only responsible for those services that benefitted it in some way. Accordingly, CRSS is liable for the prorated occupancy expenses claimed by Carroll Reed only if CRSS received a benefit from the services provided.

1. *Acton, Massachusetts*

Carroll Reed claims that the total amount owed by CRSS for the Acton, Massachusetts cotenancy is $10,702.43. *See* Jt. Exh. 2-D pp. 1-4.[12] CRSS has acknowledged responsibility for $8,954.79. *See* Defendants' Post Trial Reply Brief at 29. The only remaining disputed items are claims for Browning Ferris rubbish removal service totalling $1,741.64. *See id.*[13]

The Acton cotenancy consisted of a freestanding building shared by Carroll Reed and CRSS. Trial Transcript Vol. III p. 116. For its rubbish removal needs, Carroll Reed apparently arranged to have a trash container kept on the property. *See id*. at 122-23. Leighton could not say whether or not any of CRSS's employees ever used that trash container. *Id*. Other than ski cartons, however, Leighton proffered no evidence as to how CRSS disposed of its daily rubbish, notwithstanding its agreement to document its claim that it had an alternative means of doing so. *See id*.; Transcript of Status Conference at 6-7, 9-10. Moreover, although there was no direct evidence on CRSS's use of the rubbish removal service, over the course of its dealings with Carroll Reed CRSS never objected to being billed for the Acton rubbish service. Trial Transcript Vol. II p. 83. Based on this information, and considering the need to have rubbish removal service for a freestanding commercial building, I find that the record contains sufficient evidence to infer that CRSS received a benefit from the rubbish removal services procured by Carroll Reed for the Acton store. CRSS is therefore liable for the full amount of the claimed joint occupancy expenses for Acton.

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[12] I also note that Carroll Reed raised an additional claim of $78 for telephone bills in its summary of Acton claims. *See* Jt. Exh. 2-A p. 1. Since this claim was not specifically advanced at trial, nor is it supported by any documentation in evidence, I treat it as waived.

[13] After reviewing Carroll Reed's claims, I find that the amount of the Browning Ferris charges for rubbish removal actually total $2,256.52. *See* Jt. Exh. 2-D pp. 1-3 (Browning Ferris). Because the defendants only contest $1,741.64 of these charges, *see* Defendants' Post Trial Reply Brief at 29, I will use this figure as the operative amount.

2. *Freeport, Maine*

There are a number of issues surrounding the Freeport, Maine cotenancy. I first address Carroll Reed's rental obligations. In February 1991 Carroll Reed ceased paying rent to the landlord, FRP, as a set-off against CRSS's rental obligations, since CRSS's Leighton was the surviving partner of FRP. At trial, Carroll Reed stipulated that the defendants are entitled to offset the amount, if any, that it is found to owe on the Freeport lease against whatever sums the defendants are found to owe it. Carroll Reed disputes, however, whether it owes any money on the Freeport lease.

The landlord-tenant relationship between FRP and Carroll Reed was created by a lease agreement dated December 11, 1989, as amended August 24, 1990. Jt. Exh. 1-C pp. 1226, 1231, 1232. The lease term ran from September 1, 1989 through August 31, 1992. *Id*. at 1226. The lease expressly prohibits Carroll Reed from withholding rent as a set-off for any reason. *Id*. at 3(a). Carroll Reed's actions in withholding rent on the Freeport lease, as an attempted set-off for obligations owed to it by CRSS, thus constituted a clear breach of that agreement.

In a letter dated October 25, 1991, nearly nine months after Carroll Reed made its last rent payment, FRP notified Carroll Reed of its default in rent and declared the lease terminated. Exh. P-24; Trial Transcript Vol. III p. 72. Herein lies the dispute. Under Maine common law, the mere nonpayment of rent, though a breach of a lease agreement, does not, by itself, give rise to a right to terminate the lease. *Rubin v. Josephson*, 478 A.2d 665, 669 (Me. 1984); *Beal v. Bass*, 86 Me. 325 (1894). A landlord may terminate a lease for a default in rent, however, if the lease expressly provides that the nonpayment of rent triggers a right to terminate the lease. *Rubin*, 478 A.2d at 669; *Beal*, 86 Me. at 335. The Freeport sublease contains an express provision that allowed FRP to declare a forfeiture of the lease if Carroll Reed should fail to pay rent. Jt. Exh. 1-C at 1230 (``If Lessee shall fail to pay rent when it is due or shall fail to keep or perform any of the covenants herein, Lessor may declare a forfeiture, re-enter the premises, sue for rent, or resort to any other

remedy at law or equity."). Although a forfeiture clause is to be strictly construed against a party seeking to enforce it, *Rubin*, 478 A.2d at 669, I find that the forfeiture provision in the Freeport lease gave FRP the power to terminate the lease upon nonpayment of rent; the ability to terminate a lease inheres in the right to declare a forfeiture of the lease. *See Rubin*, 478 A.2d at 669; *Beal*, 86 Me. at 335; 49 Am. Jur. 2d, *Landlord and Tenant*, 1020, at 992; *see also Black's Law Dictionary* 650 (6th ed. 1990) (forfeiture defined as ``[a] deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition. . . . Loss of property or money because of breach of a legal obligation.").

This takes us to FRP's letter of October 25, 1991. This notification was a proper exercise of FRP's forfeiture rights under the lease. *See* Exh. P-24. The letter, as provided for in the lease, informed Carroll Reed of its default in rent and declared the lease terminated. *See id*. Because FRP acted in accordance with the forfeiture provision of the lease, I find that FRP, and hence Leighton and CRSS, did not lose the rights and remedies available under the lease by terminating it rather than merely declaring Carroll Reed to be in default, as suggested by the plaintiff. *See* Plaintiff's Reply at 13. Indeed, the lease specifically preserves Carroll Reed's liability for unpaid rent, damages and other expenses when the lease is properly terminated, as here. Jt. Exh. 1-C pp. 1230 at 13(b) (``In the event of termination of this Lease as provided herein, Lessee shall not be released or discharge[d] but shall remain and continue liable to Lessor in a sum equal to all rent, additional rent and other charges then due and shall be liable for all damages provided for hereunder . . . ."). Accordingly, Carroll Reed is liable under the lease for all rent that was improperly withheld as a set-off for CRSS's liabilities to Carroll Reed. Pursuant to the parties' stipulation, the defendants are entitled to a credit for this amount. I will address the issue of how much Carroll Reed owes on the Freeport lease, before and after termination, in the damages section of this opinion.

The remaining issues pertaining to Freeport involve Carroll Reed's claims for $5,658.32 in utilities. Jt. Exh. 2-A p. 1; Jt. Exh. 2-D pp. 6-7. CRSS was a cotenant with Carroll Reed at the

Freeport location and, as discussed previously, is bound to pay its proportionate share of the utilities. The majority of Carroll Reed's Freeport claims are for electricity from Central Maine Power, totalling $5,611.76. *See* Jt. Exh. 2-D pp. 6-7. Carroll Reed's Vogel testified that the Freeport facility had three separate meters for measuring electricity provided to the cotenancy premises. Trial Transcript Vol. II p. 235-36. One monitored electricity supplied to the portion of the premises occupied solely by CRSS, one monitored electricity supplied to the portion of the premises occupied solely by Carroll Reed, and one monitored electricity supplied to the portion of the premises that Carroll Reed and CRSS shared. *Id*. Each meter received a separate electric bill. *Id*. at 235. Invoices bearing account number 0104102 covered the electricity for the portion of the premises shared by Carroll Reed and CRSS, *id*. at 239, while invoices bearing the account number 0104099 covered the electricity for the portion of the premises occupied solely by CRSS, *see id.*; Jt Exh. 1-B pp. 391. Carroll Reed received and paid one bill that was for electricity provided solely to CRSS's area. Trial Transcript Vol. II p. 238; Jt. Exh 1-B pp. 389, 391; Jt. Exh. 2-D p. 6 (Nos. 389, 391). The remainder of the bills for which Carroll Reed claims reimbursement are for electricity shared by Carroll Reed and CRSS. *See* Trial Transcript Vol. II pp. 237-41; Jt. Exh. 2-D pp. 6-7.

CRSS's Leighton also testified that the Freeport facility had three separate meters for measuring electricity provided to the cotenancy premises. Trial Transcript Vol. III pp. 126-30. Based on his involvement with the construction of the building, assumably through his relationship with FRP, Leighton further testified that the three meters ran to three separate but equally sized retail locations on the second floor. *Id*. These three retail locations comprised the entire cotenancy premises. *Id*. According to Leighton, two of the three retail locations were occupied almost entirely by Carroll Reed, covering roughly sixty percent of the second floor. *Id*. at 129-30. CRSS occupied the third of the three locations. *Id*. Leighton stated that CRSS had a fire escape or stairway that occupied a small amount of Carroll Reed's two locations. *Id*. CRSS received separate bills from Central Maine Power for the electricity supplied solely to its location. *Id*. at 130.

Based upon my independent review of the entire record, I conclude that CRSS is

responsible for a proportion of the shared electricity charges claimed by Carroll Reed, since CRSS occupied a portion of the area to which the electricity was supplied. However, I find that the percentage factor used by Carroll Reed in determining CRSS's proportionate share is incorrect. Prior to its dissolution, Old Carroll Reed occupied the Freeport premises, consisting of 6,528 square feet. Jt. Exh. 1-C p. 1226. As of August 24, 1990, Carroll Reed negotiated a lease amendment with FRP reducing the leased space to 3,574 square feet. *Id*. at 1232. CRSS began occupying the remainder of the Freeport premises. *See* Trial Transcript Vol. I pp. 73, 87. Simple subtraction reveals that CRSS's area consisted of 2,954 square feet.

The lease amendment executed by Carroll Reed and FRP contains a floor plan showing the three separate retail locations about which Leighton testified. Jt. Exh. 1-C p. 1235. The floor plan also shows the 3,574 square foot area occupied by Carroll Reed and, hence, the remaining 2,954 square foot area occupied by CRSS. *See id*. As can be seen in the floor plan, the middle retail location is shared by both Carroll Reed and CRSS, with Carroll Reed occupying the majority of the space. *See id*. Assuming that the three separate locations marked on the floor plan are of equal size, as Leighton testified, a few calculations reveal that the amount of area in the middle location occupied by CRSS was 778 square feet, while for Carroll Reed it was 1,398 square feet.[14] Determining the percentages, CRSS occupied 36 percent and Carroll Reed 64 percent of the middle retail location. In its calculation of joint expenses, Carroll Reed used a 45.25 percent figure for determining CRSS's proportionate share of the electricity bills, *see* Jt. Exh. 2-D pp. 6-7, which is apparently the percentage of the total space occupied by CRSS at Freeport.[15] However, assuming the shared middle area has separate metering for electricity, as Leighton and Vogel both testified, CRSS is entitled to the more precise calculation for determining its proportionate share of those electricity expenses. Using the 36 percent figure instead of the 45.25 percent figure for those

[14] 6,528/3=2,176; 2,954-2,176=778 (CRSS); 3,574-2,176=1,398 (Carroll Reed).

[15] 2,954/6,528=.4525

expenses, I find that CRSS is responsible for $4,299.52, representing its proportion of the shared electricity. *See* Jt. Exh 2-D pp. 6-7. Of course, CRSS is also responsible for reimbursing Carroll Reed for the one $228.87 charge that Carroll Reed paid for electricity provided solely to CRSS's area. *See* Jt. Exh 1-B pp. 389, 391; Jt. Exh. 2-D p. 6 (Nos. 389, 391).

The final issue concerning the Freeport cotenancy is Carroll Reed's claim for air conditioning service in the amount of $46.56. Jt. Exh. 2-D p. 6 (Nos. 397, 398). Carroll Reed presented no evidence concerning the location of the air conditioning unit that was serviced. Trial Transcript Vol. II pp. 95, 232. The invoice itself does not indicate where the unit was located or to whom the service was provided. *See* Jt. Exh. 1-B p. 398. Given the separation between the three areas comprising the Freeport cotenancy, I cannot determine whether CRSS would have received any benefit from air conditioning work performed solely on Carroll Reed's units. Carroll Reed has therefore failed to meet its burden of proof on this claim.

3. *North Conway, New Hampshire*

Carroll Reed claims that CRSS owes it $23,379.62 for utilities through July 1, 1992 for the North Conway, New Hampshire cotenancy. *See* Jt. Exh. 2-A p. 3; Jt. Exh. 2-D pp. 9-11. CRSS has acknowledged responsibility for $22,928.12 of the charges. *See* Defendants' Post Trial Reply Brief at 30. CRSS now only opposes the claims for cleaning services totalling $451.50. *See id.*; Jt. Exh. 2-D pp. 9-11 (ServiceMaster). Leighton testified that CRSS employees cleaned their own premises without engaging outside contractors. Trial Transcript Vol. III p. 132-33. Carroll Reed provided no evidence that the cleaning services were provided to CRSS's portion of the premises. The invoices themselves do not indicate that the cleaning services were provided to CRSS. Jt. Exh. 1-C pp. 1078, 1082, 1091. In addition, given the separation between their two areas, CRSS would have received no benefit from cleaning services rendered to Carroll Reed's space. CRSS is thus not responsible for the claimed cleaning services.

The amount of claimed occupancy expenses submitted at trial covered the North Conway cotenancy through July 1, 1992. *See* Jt. Exh. 2-A p. 3; Jt. Exh. 2-D pp. 9-11. As of trial, however, Carroll Reed and CRSS were continuing to co-occupy the North Conway premises, and Carroll Reed was continuing to pay all utility bills. Trial Transcript Vol. II p. 75. Pursuant to its judicial admission of an agreement to pay for these costs, CRSS is also responsible for reimbursing Carroll Reed its proportionate share of the utility expenses for North Conway incurred from July 2, 1992 through the end of the cotenancy arrangement.

4. *Portland, Maine*

Carroll Reed originally claimed that the total amount owed by CRSS for joint occupancy expenses at the Portland, Maine location was $9,961.69. *See* Jt. Exh. 2-D pp. 11-12.[16] At trial, however, Carroll Reed withdrew claims totalling $812.58. Trial Transcript Vol. II pp. 103, 108. In addition, following trial CRSS acknowledged responsibility for $ 8,489.89. *See* Defendants' Post Trial Reply Brief at 30. The only remaining disputed items are the claims for rubbish removal service and one of two air conditioning service charges, totalling $659.22. *See id.*; Jt. Exh. 2-D pp. 11-12 (McCormicks Light Trucking and Thayer Corp. (No. 1199 only)).

The Portland cotenancy was located in a building in downtown Portland. For its rubbish removal, Leighton testified that CRSS had its own arrangement with the building personnel. Trial Transcript Vol. III p. 134. Leighton testified that CRSS also arranged to have some outside vendor come in ``every once in a while'' to dispose of large items. *Id.* at 135. CRSS could not document its separate rubbish removal arrangements because no such documentation exists. *Id.* at 134-36; Transcript of Status Conference at 6-7, 9-10. Carroll Reed introduced no evidence that CRSS utilized the rubbish removal services Carroll Reed had procured for the Portland location. I also

[16] In its summary of the Portland expenses Carroll Reed also submitted a claim for $553 in telephone bills. *See* Jt. Exh. 2-A p. 4. This claim was not addressed at trial, nor is it supported by any invoices or documents in evidence. I therefore treat it as waived.

note that Carroll Reed's and CRSS's areas were completely separate. Given Leighton's testimony that CRSS had other means of disposing of its rubbish, notwithstanding the lack of any supporting documentation, I find that the evidence sufficiently demonstrates that CRSS received no benefit from the trash removal services procured by Carroll Reed for the Portland location.

I also find that the CRSS received no benefit from the claimed air conditioning services. The building where CRSS and Carroll Reed were located has a central air conditioning system. Trial Transcript Vol. III p. 138. Each occupant in the building has individual air conditioning units in its premises. *Id*. Leighton testified that CRSS serviced its own unit without outside help. *Id*. at 137-38. The invoice itself does not indicate that any service was provided to CRSS's unit. *See* Jt. Exh 1-C p. 1200. In addition, because CRSS and Carroll Reed were not internally connected, CRSS would not have received any benefit from air conditioning work performed on Carroll Reed's units. Accordingly, CRSS is not responsible for the claimed air conditioning services.

D. OTHER EXPENSES

Carroll Reed contends that it incurred a number of expenses for freight, security and other services on behalf of CRSS. *See* Jt. Exhs. 2-E, 2-F, 2-G. With Carroll Reed having dropped a number of these claims at trial, and CRSS acknowledging its responsibility for a number of the remaining charges, the issue over other expenses has boiled down to a single claim for $58 in journal tapes. *See* Jt. Exh. 2-G p. 1 (No. 574). These tapes were shipped to a store located in Campton, New Hampshire. Trial Transcript Vol. III p. 37; Jt. Exh. 1-C pp. 571, 574. CRSS has never operated a store in Campton, New Hampshire. Trial Transcript Vol. III p. 143. CRSS is obviously not responsible for this charge.

III. DAMAGES

Based on the foregoing conclusions of law and the parties' stipulations and joint submissions, I find that (1) CRSS is liable to Carroll Reed in the total amount of $180,833.55; (2) Leighton is jointly and severally liable to Carroll Reed for $22,633.93, the amount CRSS owes on the Hanover, Massachusetts sublease, plus Carroll Reed's reasonable attorney fees and costs recoverable under that sublease; (3) Carroll Reed is liable to CRSS for $36,087.50 plus interest from August 28, 1991 for the Hanover, New Hampshire conversion; and (4) Carroll Reed is liable for $74,736.76 for the withheld Freeport rent, to be used as a set-off against CRSS's and Leighton's liabilities. Attorney fees and costs are also available as provided herein. In addition, CRSS has continuing liability to Carroll Reed arising out of the North Conway, New Hampshire cotenancy and contingent future liability for rent under the Hanover, Massachusetts sublease. The breakdown of damages is as follows:

A. CARROLL REED'S DAMAGES

With respect to the Hanover, Massachusetts sublease, CRSS is liable to Carroll Reed for $40,231.93, consisting of $37,543.00 in rent from August 24, 1990 through April 1991, *see* Jt. Exhs. 2-A p. 2, 2-B p. 1; *supra* p. 20, $1,823.87 in CAMS, *see* Jt. Exh. 2-C p. 1; *supra* p. 21, and $865.06 in joint occupancy expenses, *see* Jt. Exh. 2-D pp. 12; *supra* pp. 21-22. Taking into account the $17,598.00 CRSS has paid on the Hanover, Massachusetts sublease, *see* Jt. Exh. 2-H, defendant Leighton is jointly and severally liable to Carroll Reed for the remaining $22,633.93 pursuant to his personal guaranty of the sublease, *supra* pp. 22-23. CRSS also remains liable for rent under the sublease to the extent that Carroll Reed is ever found liable under the prime lease for obligations incurred after April 1991. *Supra* pp. 20-21.

For the Hanover, New Hampshire sublease, CRSS is liable to Carroll Reed for $69,119.39, consisting of $60,997.48 in rent from August 24, 1990 through August 27, 1991,[17] *see* Jt. Exhs. 2-A

[17] Thirteen months at $4,646 per month, plus 4/31 of a month x $4,646.

p. 2, 2-B p. 2-3; *supra* pp. 23-25, 28, $5,313.44 in CAMS,[18] *see* Jt. Exh. 2-C pp. 1-2; *supra* p. 28, and $2,808.47 in joint occupancy expenses, *see* Jt. Exh. 2-D pp. 7-8; *supra* pp. 28-29.

For the Lincoln, New Hampshire sublease, CRSS is liable to Carroll Reed for $39,554.11, consisting of $18,955 in rent from August 24, 1990 through June 30, 1991, *see* Jt. Exhs. 2-A p. 3, 2-B p. 2; *supra* p. 29, $17,815.05 in CAMS, *see* Jt. Exh. 2-C p.2, *supra* p. 29, and $2,784.06 in joint occupancy expenses, *see* Jt. Exh. 2-D pp. 8-9, *supra* pp. 29-30.

For the Winooski, Vermont sublease, CRSS is liable to Carroll Reed for $58,530.90, consisting of $27,244 in rent from August 24, 1990 through August 15, 1991, *see* Jt. Exhs. 2-A p. 1, 2-B p. 1; *supra* p. 30, $24,111.55 in CAMS, *see* Jt. Exh. 2-C p. 3; *supra* pp. 30-31, and $7,175.35 in joint occupancy expenses, *see* Jt. Exh. 2-D pp. 4-5; *supra* pp. 31-32.

For the Acton, Massachusetts cotenancy, CRSS is liable to Carroll Reed for $10,702.43 in joint occupancy expenses. *See* Jt. Exh. 2-D pp. 1-4; *supra* pp. 33-34.

For the Freeport, Maine cotenancy, CRSS is liable to Carroll Reed for $4,528.39 in joint occupancy expenses. *See* Jt. Exh. 2-D pp. 6-7; *supra* pp. 36-39.

For the North Conway, New Hampshire cotenancy, CRSS is liable to Carroll Reed for $22,928.12 in joint occupancy expenses. *See* Jt. Exh. 2-D pp. 9-11; *supra* pp. 39-40. CRSS is also liable for its proportionate share of the North Conway joint occupancy expenses incurred from July 2, 1992 through the end of the cotenancy.

For the Portland, Maine cotenancy, CRSS is liable to Carroll Reed for $8,489.89 in joint occupancy expenses. *See* Jt. Exh. 2-D pp. 11-12; *supra* pp. 40-42.

For other expenses relating to freight, security and other services, CRSS is liable to Carroll Reed for $6,083.39. *See* Jt. Exhs. 2-E, 2-F, 2-G; *supra* p. 42.[19]

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[18] Item No. 780 is adjusted from $202.01 to $175.94 in recognition of the August 27 cutoff. *See* Jt. Exh. 2-C p. 1.

[19] Carroll Reed has also asserted a claim for compensatory and punitive damages against defendant Leighton individually on the basis of his alleged fraud and misrepresentation in failing to pay the rent and shared expenses. Complaint 20-22. Leaving aside the adequacy of the plaintiff's pleading, *see* Fed. R. Civ. P. 9(b), I find insufficient evidence in the record to support this claim. Since the beginning of their relationship, Carroll Reed's claims for expenses for the various subleases and cotenancies went

Based on the parties' stipulation, CRSS is also liable to Carroll Reed for an additional $10,000 in damages. *See* Exh. P-25; Trial Transcript Vol. III p. 78. This brings the total gross sum owed by CRSS to $270,168.55. Against this amount CRSS is entitled to a credit of $89,335, the amount it paid to Carroll Reed for its expenses during 1990 and 1991. *See* Jt. Exh. 2-H. The net damages owed by CRSS thus total $180,833.55, plus attorney fees and costs as provided herein.

B. LEIGHTON'S AND CRSS'S DAMAGES

On the defendants' counterclaims, I find that Carroll Reed is liable for an amount totalling $110,824.26, consisting of $36,087.50 in damages to CRSS for the Hanover, New Hampshire conversion and $74,736.76 in set-offs to Leighton and CRSS for the withheld Freeport rent. Carroll Reed is also liable for interest on the $36,087.50 owed to CRSS from August 28, 1991.

1. *Conversion Damages*

I first address the damages calculation for the Hanover, New Hampshire conversion. ``The ordinary measure of damages in an action for conversion is the value of the property at the time of conversion with interest to the date of judgment." *Perry v. W. H. Burbee, Inc.*, 129 A.2d 670, 671 (N.H. 1957). Leighton, as the president of CRSS, testified as to the value of the converted goods on August 28, 1991, the date of the conversion. *See* Trial Transcript Vol. III pp. 200-22. His opinion as to the value of the goods was based on his familiarity with the property and equipment at the

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through several accountings and corresponding revisions. Indeed, a number of Carroll Reed's claims were eliminated as late as trial. More importantly, Carroll Reed, somewhat sporadically, sent CRSS only summaries of the expenses it had paid; supporting documentation for the claimed expenses was not provided to Leighton or CRSS until August 16, 1991, nearly one year after Carroll Reed first started paying expenses on CRSS's behalf. Default letters on the subleases were sent out one week later, on August 23, 1991, and litigation ensued. Although I ultimately found CRSS liable for the majority of these claimed expenses, on these facts I find no evidence of fraud or misrepresentation on the part of Leighton in his dealings with Carroll Reed concerning its claims for rent and shared expenses.

Hanover location, *id*. at 164-65, his twenty-plus years of experience in the purchasing, pricing and resale of ski-related inventory and fixtures, *id*. at 159-60, 163-64, and his experience in liquidating retail stores, *id*. at 224. I find that Leighton was properly qualified to give his best judgment as to the value of CRSS's goods in the Hanover location at the time of the conversion. *See Shane v. Shane*, 891 F.2d 976, 981-82 (1st Cir. 1989); *Gregg v. U.S. Industries, Inc.*, 887 F.2d 1462, 1469 (11th Cir. 1989); *see also* N.H.R.S.A. 516:29 (1992); *Roy v. State*, 191 A.2d 522, 524-25 (N.H. 1963).

To establish what goods Carroll Reed actually converted, the defendants presented an auctioneer's inventory, *see* Exh. D-8 at 3 (unnumbered), and the testimony of Leighton, *see* Trial Transcript Vol. III pp. 158-77, 200-22. The inventory was compiled on January 16, 1993 by a third-party auctioneer Carroll Reed hired to dispose of CRSS's Hanover property. Trial Transcript Vol. I pp. 230-31; Exh. D-8 at 3. An auctioneer's inventory may be used to prove what items have been converted. *See Morin v. Hood*, 79 A.2d 4, 5 (N.H. 1951). Leighton opined that the first five items on the list -- skis, ski boots and poles -- inaccurately accounted for the quantity of these items actually converted. Trial Transcript Vol. III p. 107, 158. He claimed that CRSS had at least 150 pairs of rental skis and boots in the facility at the time of the conversion. *Id*. This belief was premised on the need to have that much equipment on hand to run a rental shop and his visit to the store five to six weeks before the conversion. *Id*. at 158-59, 169-70. Otherwise, he thought the list was generally a complete and accurate inventory of the Hanover goods. *Id*. at 163, 171-76.

I find that Leighton's testimony concerning the extra 150 sets of rental equipment is insufficient to establish that such equipment was among the property converted by Carroll Reed. Leighton claims to have seen this equipment in the Hanover store five to six weeks before the conversion. *Id*. at 169-70. Leighton, however, had no knowledge of what items CRSS personnel subsequently removed from the store in August 1991 when gathering goods for its tent sale. *Id*. at 172. Leighton could not say whether or not CRSS had removed the 150 pairs of rental skis and boots at that time. *See id*. In addition, CRSS presented no documentary or testimonial evidence

about the items it removed for the tent sale. *Id*. at 170-71. Given this lack of evidence as to what CRSS removed from the store and the lapse of time between Leighton's visit and the conversion, I conclude that CRSS has not sustained its burden of proving that the claimed extra rental equipment was among the converted property.

Despite CRSS's failure to establish the existence of the 150 pairs of rental skis and boots, I nevertheless note that Carroll Reed's auction did result in the sale of at least $4,605 of rental ski equipment. The auction was a two-day event, January 15 and 16, 1993, with the first day devoted to the sale of rental skis, boots and poles. *See* Exh. D-8 at 15 (unnumbered) (January 15 advertisement). The first day produced $4,605 in sales. *See id*. at 1. The ski items sold on January 15 were not listed on the auctioneer's inventory, apparently because that inventory was only a compilation of the goods to be sold on January 16. *See id*. at 3 (date). Only the ski items remaining from January 15 were to be sold on January 16. *See id*. at 15 (January 16 advertisement). The auctioneer's inventory is therefore an incomplete record of the converted property, since it does not reflect the ski items sold on January 15. Thus, notwithstanding the absence of these items from the inventory, the evidence indicates that a certain amount of CRSS's rental equipment was indeed converted and sold at auction. Although CRSS failed to establish the specific numbers of rental skis and boots on the premises at the time of conversion, the record reveals that at least $4,605 worth of rental ski equipment was sold on January 15. *See* Exh. D-8 at 1. CRSS is entitled to the proceeds generated from the sale of this equipment. *See Morin*, 79 A.2d at 5.

As for the ski equipment that remained after the January 15 sale, the auctioneer's inventory listed seventeen pairs of rental skis and boots. Exh D-8 at 3 (Nos. 2, 5). Leighton testified that the rental skis and boots were worth $100 as a package. Trial Transcript Vol. III p. 207. I also note that the auctioneer advertised this equipment for the same price. Exh. D-8 at 15. I find $100 to be a reasonable value for these items. CRSS is thus entitled to $1,700 for the remaining seventeen pairs of rental skis and boots. The January 16 inventory also listed twenty-five pairs of adult downhill boots, thirty-two pairs of children's downhill boots, twenty-six pairs of cross-country ski boots and

numerous ski poles. *Id*. at 3 (Nos. 1, 3, 4, 6). These items brought $892.50 at the auction. *See* Exh D-8 at 4-5 (unnumbered) (receipts). CRSS is entitled to this amount.

In addition to the ski equipment, synthesizing the auctioneer's inventory of the known converted goods and Leighton's testimony about the value of those goods, I find that the value of the remaining converted goods as of August 28, 1991 was $28,890. Minus the 150 pairs of rental skis, boots and poles, Leighton testified that the value of the major converted items was $28,890.[20] *See* Trial Transcript Vol. III pp. 208-23. Although this amount is far more than the items actually fetched at the auction, *see* Exh. D-8, given Leighton's experience in valuating such ski-related equipment, I find that it represents a reasonable estimation of their value at the time of conversion. After all, the auction was a forced sale designed to liquidate the goods, not get the best price, *see* Trial Transcript Vol. I p. 231, Trial Transcript Vol. III p. 72, and was held nearly seventeen months after the conversion, *see* Exh. D-8 at 1. Having put these items beyond CRSS's control, Carroll Reed cannot now complain about CRSS's reasonable attempts to approximate their value over two years later. *Cf. Bailey v. Shaw*, 24 N.H. 297, 301 (1851); 18 Am. Jur. 2d, *Conversion*, 105 at 220. I note that CRSS has not made a claim for the numerous minor items converted and sold at the auction. *See id*. at 3 (chairs, filing cabinets, mats, etc.).

In summary, I find that the total value of the claim converted property as of August 28, 1991 was $36,087.50. By law, CRSS is also entitled to interest from the date of conversion, August 28, 1991, until the date of judgment. I find no evidence of malice, wantonness or oppression on the part of Carroll Reed that would make it liable for special, ``liberal compensatory damages" under New Hampshire law. *See, e.g., DCPB, Inc. v. City of Lebanon*, 957 F.2d 913, 915 (1st Cir. 1992); *Aubert v. Aubert*, 529 A.2d 909, 914-15 (N.H. 1987); *Vratsenes v. N.H. Auto, Inc.*, 289 A.2d 66, 68 (N.H. 1972).

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[20] Wet belt, $5,000; ski storage bins, $2,400; tools, $1,850; computer and cash register, $5,000; cash wrap station, $2,500; brass display fixtures, $6,000; ski racks, $640; entertainment center, $2,500; glove case, $3,000. *See* Trial Transcript Vol. III pp. 208-23.

2. *Freeport Rent Set-Off*

Carroll Reed is also liable for the rent withheld on the Freeport sublease. At trial, the parties stipulated that the defendants could offset the Freeport arrearages, if any, against whatever sums they were found to owe the plaintiff. Trial Transcript Vol. III pp. 3-4. The amount owed by Carroll Reed on the Freeport sublease for rent and utilities, as corrected, is $74,736.76. The defendants originally claimed that the amount owed on the Freeport lease was $80,304.92. Exh. D-5. At trial, Carroll Reed contested a few of these charges. *See* Trial Transcript Vol. III pp. 63-66. Specifically, Vogel testified that ``Additional Rent to Minimum" for February, March and May 1991 was incorrectly charged to Carroll Reed. *Id*. at 64. Also, the figure for the October 24, 1990 ``3rd Q CAM bill" was incorrect. *Id*. Instead of $2,354.48, this figure should have been $973.72. *Id*. In addition, Vogel stated that Carroll Reed already paid the 1990 third quarter CAM bill. *Id*. at 64-65. Finally, Vogel discovered a mathematical error for the September 1992 rent calculation. *Id*. This figure should have been $1,985.36 instead of $4,625.20. *Id*. Other than these items, Vogel did not question the accuracy of any of the other amounts listed in the defendants' Freeport accounting. *Id*. at 65-66.

Correcting the figures based on Vogel's testimony, the amount owed by Carroll Reed for its occupancy of the Freeport premises is $74,736.76. The defendants have adopted Carroll Reed's figures as the correct amount due. *See* Defendants' Post Trial Reply Brief at 36, 47. Accordingly, I find that Carroll Reed is liable for $74,736.76 for withheld rent and other obligations due under the Freeport sublease.[21] Used as a set-off, this amount reduces CRSS's liability to $106,096.79,

[21] I note that by its terms the Freeport lease expired on August 31, 1992. Jt. Exh. 1-C p. 1226. Carroll Reed, however, remained in possession of the premises through October 1992. Trial Transcript Vol. I p. 226; Trial Transcript Vol. III pp. 72-73. Technically, Carroll Reed cannot be held liable for rent or damages under the lease accruing or occurring after August 31, 1992 since the lease had expired. Instead, Carroll Reed, as a holdover tenant, is liable for the value of the use and occupation of the premises from September 1, 1992 through October 1991. *McFarland v. Stewart*, 142 Me. 269-71 (1946). I find, however, that this legal transformation does not change the amount Carroll Reed owes as damages. Carroll Reed continued to provide FRP with

exclusive of adjustments reflecting any costs and attorney fees ultimately determined to be owing under the subleases. Because the Freeport rent was money technically due Leighton, as the surviving partner of FRP, in the interest of fairness I conclude that this set-off also extinguishes Leighton's liability under his personal guaranty for CRSS's liability on the Hanover, Massachusetts sublease. This reduces Leighton's personal liability to zero.

C. ATTORNEY FEES AND COSTS

A number of the subleases involved in this case allow for the recovery of costs, such as attorney fees, incurred in remedying a breach or default. *See* Jt. Exh. 1-B pp. 638-40, 643-44 (Hanover, MA); Jt. Exh. 1-B p. 733 (Hanover, NH); Jt. Exh. 1-C pp. 889, 890 (Lincoln, NH); Jt. Exh. 1-C p. 1230 (Freeport, ME). These provisions are all valid and enforceable. *See Leavitt v. Hamelin*, 495 A.2d 1286, 1287 (N.H. 1985); *Poussard v. Commercial Credit Plan, Inc*., 479 A.2d 881, 883 (Me. 1984); *Lincoln St. Realty Co. v. Green*, 373 N.E.2d 1172, 1173 (Ma. 1978). Accordingly, Carroll Reed may recover its costs, including reasonable attorney fees, attributable to its efforts to remedy CRSS's defaults on the Hanover, Massachusetts and Lincoln, New Hampshire subleases. As for the Hanover, New Hampshire sublease, I note that the sublease allows both the sublessor and the sublessee to recover their costs, including attorney fees, when the other party has breached the sublease. *See* Jt. Exh. 1-B p. 733. Thus, Carroll Reed may recover its costs, including reasonable attorney fees, attributable to its efforts to remedy CRSS's pre-eviction default in rent, CAMS and occupancy expenses. Likewise, CRSS is entitled to recover any incurred costs,

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copies of its sales records up until the time it vacated the premises at the end of October 1992. Trial Transcript Vol. III pp. 65, 149-50. From these sales figures, FRP determined the percentage rent. *Id*. Except for the one mathematical error, Carroll Reed has not disputed the accuracy or propriety of FRP's charges for the period of occupancy after the expiration of the lease. *Id*. at 65-66. Consequently, I find that the September and October 1992 sales figures provided by Carroll Reed and incorporated into FRP's ``rent'' calculation, as well as the prorated charges for tax, insurance and CAMS for that period, represent a reasonable value for the use and occupancy of the property from September 1, 1992 through the end of October 1992.

including reasonable attorney fees, attributable to Carroll Reed's breach of its covenant of quiet enjoyment. Additionally, Leighton, as the surviving partner of FRP, is entitled to recover his costs and attorney fees attributable to his efforts to rectify the Freeport rent situation. In accordance with the parties' stipulation, this amount shall be set-off against the amount owed Carroll Reed. I note that the Winooski, Vermont sublease allows Carroll Reed to recover ``all costs and expenses" incurred in remedying a default, though it does not expressly provide for the recovery of attorney fees. *See* Jt. Exh. 1-A p. 234. In the absence of a specific provision for the recovery of attorney fees, such an award is unavailable under Vermont law. *See Highgate Assoc. v. Merryfield*, 597 A.2d 1280, 1283 (Vt. 1991). However, Carroll Reed is entitled to recover any other costs and expenses attributable to its efforts to remedy CRSS's default on the Winooski, Vermont sublease. The procedure to be followed for the determination and allocation of attorney fees and costs is set forth below.

IV. CONCLUSION

In conclusion, after all set-offs and consolidation of damages, CRSS is liable to Carroll Reed in the net amount of $70,009.29, minus the interest due on the conversion damages of $36,087.50 from August 28, 1991 to the date of judgment and costs and attorney fees owing the defendants under the Freeport, Maine lease and Hanover, New Hampshire sublease, plus costs and/or attorney fees owed Carroll Reed under one or more of the Hanover, Massachusetts, Hanover, New Hampshire, Lincoln, New Hampshire and Winooski, Vermont subleases. CRSS also has continuing liability to Carroll Reed with respect to the North Conway, New Hampshire cotenancy and remains liable for rent under the Hanover, Massachusetts sublease to the extent that Carroll Reed is ever found liable under the prime lease to its landlord for the period ending July 31, 1994. Leighton retains no personal liability.

Carroll Reed, CRSS and Leighton shall each prepare a detailed application for attorney fees and costs to which I have determined that party to be entitled under the various leases and serve the same upon opposing counsel by February 16, 1994. If the parties are unable to agree on the attorney fee and cost awards to be included in the judgment by February 25, 1994, they shall by that date file with the court their applications, together with their respective statements stating in detail the reasons why they cannot agree, and a proposed order for entry of final judgment herein setting forth in full the terms of said judgment, including a declaration of rights concerning CRSS's continuing liability for the North Conway utilities and its contingent future liability under the Hanover, Massachusetts sublease and interest due on the conversion damages, as indicated in this opinion. If the parties do agree on the awards, their attorneys shall promptly notify the court in writing and submit a joint proposed order of final judgment.

Dated at Portland, Maine this 1st day of February, 1994.

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David M. Cohen
United States Magistrate Judge